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THE EXCLUSIVITY RULE: DUAL CAPACITY AND THE RECKLESS EMPLOYER

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I. INTRODUCTION

Workers' compensation has been, since the early 1900s, a type of social insurance[1] designed to compensate employees who are injured on the job. One author describes the workers' compensation scheme as "a mechanism for providing cash-wage benefits and medical care to victims of work-connected injuries, and for placing the cost of these injuries ultimately on the consumer, through the medium of insurance, whose premiums are passed on in the cost of the product."[2]

Because workers' compensation is based upon a "no fault" concept,[3] it is important to avoid tort concepts. Authorities in the field agree that one of the major problems in this area of law is the "importation of tort ideas"[4] into the scheme. Yet examples abound of courts injecting tort terms and criteria into workers' compensation decisions. Indeed, it is nearly impossible to discuss some aspects of workers' compensation without also mentioning tort terms in the same breath.

The advent of workers' compensation gave the employee, who previously had little hope of compensation for work-related injury, a system of compensation which did not require him to prove any fault on behalf of the employer.[5] In the same vein, the employer could no longer avoid payment of compensation by resorting to the common law defenses of assumption of risk, contributory negligence, or fellow servant to defeat the employee's claim.[6] In return for speedy compensation and the employer's relinquishment of the above-mentioned defenses, the employee traded the right to sue the employer for negligence.[7] Indeed, the trade off—nearly guaranteed compensation in exchange for employer immunity from

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1. Mahlum v. Broeder, 147 Mont. 386, 394, 412 P.2d 572, 576 (1966).

2. 1 A. LARSON, WORKMENS' COMPENSATION § 1.00 (Desk ed. 1984).

3. State *ex rel.* Morgan v. Industrial Acc. Bd., 130 Mont. 272, 286, 300 P.2d 954, 962 (1956).

4. 1 A. LARSON, *supra* note 2, at § 1.20.

5. *Morgan*, 130 Mont. at 286, 300 P.2d at 962.

6. *See, e.g.*, CAL. LAB. CODE § 3708 (West Supp. 1985); COLO. REV. STAT. § 8-42-101 (1972); NEB. REV. STAT. § 48-102 (1984); NEV. REV. STAT. § 616.375(3) (1979); N.J. STAT. ANN. § 34:15-2 (West 1979).

7. MONT. CODE ANN. § 39-71-411 (1985) provides, in part, that: "For all employments covered under the Workers' Compensation Act or for which an election has been made for coverage under this chapter, the provisions of this chapter are exclusive."

suit—made the system workable. Today, however, social changes have rendered the workers' compensation system inequitable in some instances.[8] This comment examines the "exclusivity" provisions of workers' compensation schemes; it focuses on those instances in which it appears grossly unfair to prohibit the employee from suing the employer—especially where the employer has exhibited willful, wanton and reckless conduct,[9] or where the employer is acting in a dual capacity.[10]

II. EXCLUSIVITY IN WORKERS' COMPENSATION

Virtually all workers' compensation systems in the United States contain some type of exclusive remedy provision.[11] That is, workers' compensation is the *only* remedy available to the injured

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8. Amchan, *"Callous Disregard" for Employee Safety: The Exclusivity of the Workers' Compensation Remedy Against Employers*, 34 LAB. L.J. 683, 685 (1983). Amchan suggests that

> American courts have become increasingly more concerned with personal rights relative to property rights. Even if the surrender of the common law right to sue was fair in 1920, the vastly increased change of any plaintiff succeeding in a damage action today warrants a review of the equities of denying an injured worker his right to sue in all cases. Additionally, other programs such as Social Security and unemployment insurance have decreased somewhat the benefit gained by the injured workers in this exchange.

9. *See, e.g.*, Mandolidis v. Elkins Indus. Inc., 161 W. Va. 695, 246 S.E.2d 907 (1978).

10. *See, e.g.*, Vesel v. Jardine Mining Co., 110 Mont. 82, 100 P.2d 75 (1940); Bell v. Industrial Vangas, 30 Cal. 3d 268, 637 P.2d 266, 179 Cal. Rptr. 30 (1981).

11. ALA. CODE § 25-5-53 (Supp. 1985); ALASKA STAT. § 23.30.055 (1985); ARIZ. REV. STAT. ANN. § 23-1022 (1983); ARK. STAT. ANN. § 81-1304 (Supp. 1985); CAL. LAB. CODE § 3601 (West Supp. 1985); COLO. REV. STAT. § 8-43-104 (Supp. 1984); CONN. GEN. STAT. ANN. § 31-284 (1985); DEL. CODE ANN. tit. 19, § 2304 (1979); D.C. CODE ANN. § 36-304 (1981); FLA. STAT. ANN. § 440.11 (West 1981 & Supp. 1985); GA. CODE § 34-9-11 (Supp. 1985); HAWAII REV. STAT. § 386-5 (1976); IDAHO CODE § 72-211 (1973); ILL. ANN. STAT. ch. 48, § 138.5 (Smith-Hurd Supp. 1985); IND. CODE ANN. § 22-3-2-6 (Burns Supp. 1985); IOWA CODE ANN. § 85-20 (West 1984); KAN. STAT. ANN. § 44-501 (1981); KEN. REV. STAT. ANN. § 342.610 (Baldwin 1981); LA. REV. STAT. ANN. § 23:1032 (West 1985); MAINE REV. STAT. ANN. tit. 39, § 28 (1978); MD. ANN. CODE art. 101, § 15 (1985); MASS. GEN. LAWS ANN. ch. 152, § 24 (West 1976); MICH. STAT. ANN. § 17.237(131) (Callaghan 1982); MINN. STAT. ANN. § 176.031 (West 1966); MISS. CODE ANN. § 71-3-9 (1973); MO. ANN. STAT. § 287.120 (Vernon Supp. 1985); MONT. CODE ANN. § 39-71-411 (1985); NEB. REV. STAT. § 48-111 (1984); NEV. REV. STAT. § 616.370 (1979); N.H. REV. STAT. ANN. § 281:12 (Supp. 1983); N.J. STAT. ANN. § 34:15-1 (West 1959); N.M. STAT. ANN. § 52-1-9 (1978); N.Y. WORK. COMP. LAW § 11 (McKinney Supp. 1984); N.C. GEN. STAT. § 97-10.1 (1979); N.D. CENT. CODE § 65-01-08 (1960); OHIO REV. CODE ANN. § 4123.74 (Page 1980); OKLA. STAT. ANN. tit. 85, § 12 (West Supp. 1984); OR. REV. STAT. § 656.018 (1983); PA. STAT. ANN. tit. 77, § 51 (1952); R.I. GEN. LAWS § 28-29-20 (Supp. 1984); S.C. CODE ANN. § 42-1-540 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 62-3-2 (1978); TENN CODE ANN. § 50-6-108 (Supp. 1985); TEX. REV. CIV. STAT. ANN. art. 8306(3) (Vernon Supp. 1985); UTAH CODE ANN. § 35-1-60 (1974); VT. STAT. ANN. tit. 21, § 622 (1978); VA. CODE § 65.1-40 (1980); WASH. REV. CODE ANN. § 51.04.010 (Supp. 1986); W. VA. CODE § 23-2-6 (1985); WIS. STAT. ANN. § 102.03(2) (West Supp. 1985); WYO. STAT. § 27-12-103 (Supp. 1983).

employee, with very few exceptions.[12] The crucial fact in establishing the exclusivity of a compensation claim is determining whether the employee's injury is one "arising out of and in the course of his employment."[13] The fact that the employee does not make a claim for compensation will not remove the employer from the exclusive remedy provision, thereby allowing the employee to sue in tort.[14] Once a court has determined that an employee's injury is within the scope of workers' compensation coverage, the chance of the employee succeeding with a common law action is slim at best.

Montana's exclusive remedy statute is in accord with the vast majority of states. Section 39-71-411 of Montana Code Annotated provides in part that: "[A]n employer is not subject to any liability whatever for the death of or personal injury to an employee covered by the Workers' Compensation Act. . . . The Workers' Compensation Act binds the employee himself, and in case of death binds his personal representative and all persons having any right or claim to compensation for his injury or death . . . ."[15] Since the adoption of the statute, the Montana Supreme Court has many times held that the Montana Workers' Compensation Act provides the exclusive remedy for employees injured on the job.[16] The few instances in which the employer is removed from the exclusivity provision will be discussed more fully later.

While exclusivity statutes generally prohibit the initiation of tort actions for injuries sustained on the job, most workers' com-

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12. The exceptions include the dual capacity doctrine, injuries sustained as a result of reckless employer conduct, and intentional torts committed by the employer. *See, e.g., Vesel*, 110 Mont. 82, 100 P.2d 75; *Mandolidis*, 161 W. Va. 695, 246 S.E.2d 907; Great W. Sugar Co. v. District Court, 188 Mont. 1, 7, 610 P.2d 717, 720 (1980).

13. MONT. CODE ANN. § 39-71-407 (1985) provides:

> Every insurer is liable for the payment of compensation, in the manner and to the extent hereinafter provided, to an employee of an employer it insures who receives an injury arising out of and in the course of his employment, or in the case of his death from such injury, to his beneficiaries, if any.

14. *See* Sedore v. Sayre, 119 N.Y.S.2d 204 (1953).

15. MONT. CODE ANN. § 39-71-411 (1985).

16. *See generally* Noonan v. Spring Creek Forest Prod., Inc., ___ Mont. ___, 700 P.2d 623 (1985) (the employer's knowledge of a hazardous machine will not remove the employer from the protection of the exclusive remedy statute); Iverson v. Argonaut Ins. Co., 198 Mont. 340, 645 P.2d 1366 (1982) (the compensation rights of relatives and dependents of a deceased employee are those provided by workers' compensation); *Great W. Sugar Co.*, 188 Mont. 1, 610 P.2d 717 (unless the employee alleges intentional tort, the employer is immune from suit); Brown v. Stauffer Chem. Co., 167 Mont. 418, 539 P.2d 374 (1975) (assaults on an employee by a supervisor do not act to remove the employer's shield against tort actions); Carlson v. Anaconda Co., 165 Mont. 413, 529 P.2d 356 (1974) (even though the employer does not pay the benefits provided by the Act, the employee's sole remedy is with the Workers' Compensation Division); Enberg v. Anaconda Co., 158 Mont. 135, 489 P.2d 1036 (1971) (the employer's immunity from suit remains despite employer violation of safety statutes); Wirta v. North Butte Mining Co., 64 Mont. 279, 210 P. 332 (1922).

pensation schemes fail to compensate the employee for the entire amount of damages suffered.[17] The employee is instead compensated for medical and rehabilitation costs, together with a percentage of the salary lost due to the accident.[18] Thus, while employer tort immunity is the quid pro quo which employees have exchanged for statutorily-guaranteed compensation, evidence suggests that many injured employees suffer adverse financial effects because of the limited scope of workers' compensation benefits.[19]

In addition to the often minimal compensation injured employees receive, there are frequent time delays in payment due to administrative problems and disagreement between the employer and employee as to the injury's compensability. In fact, in one Montana case the injured employee was without compensation for a period of seven years following the accident.[20]

Another problem which hampers the current workers' compensation system arises because the employer often bears an insignificant portion of the cost of an employee's injury.[21] A system which allows the employee to sue in tort, in some cases, would shift the cost more directly to the employer. The employer would either make the workplace more safe or, in the alternative, would suffer the effects of tort actions. As one author has observed:

> It would be nice to think that employers are impelled by humane motives to consider the health and safety of their employees as the paramount concern. But the unfortunate truth is that business reacts best to hopes of profit maximization. Where some employers can avoid more costly protections for their employees without incurring additional liability, they usually will do so.[22]

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17. Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641, 1652 (1983).

18. *Id.* at 1642. *See also* MONT. CODE ANN. § 39-71-705 to -743 (1985).

19. Note, *supra* note 17, at 1643 n.16. *See also* Samers and Kelly, *Promptness of Payment in Workers' Compensation*, 1 RESEARCH REPORT OF THE INTERDEPARTMENTAL WORKERS' COMPENSATION TASK FORCE 63, 75-76, stating that the wages lost due to industrial injury were replaced at the rate of 42%; and that one-half to three quarters of those surveyed could not maintain their pre-injury standard of living.

20. Conway v. Blackfeet Indian Developers, ___ Mont. ___, 669 P.2d 225 (1983). While not advocating the allowance of tort actions by injured employees, the Montana Supreme Court did express outrage over the time delay, saying: "[a]lthough some inherent institutional delay may be expected as a claim lumbers through the process, it is clear as day that a 7-year case time is intolerable to a worker. . . . If this case does not shake some legislator's conscience, perhaps nothing will."

21. Ashford and Johnson, *Negligence v. No-Fault Liability: An Analysis of the Workers' Compensation Example*, 12 SETON HALL L. REV. 725, 759-60 (1982), where the authors note that even under the most efficient compensation systems the employer bears less than 9% of the employee's wage loss.

22. Schroeder, *Workers' Compensation: Expanding the Intentional Tort Exception to Include Willful, Wanton, and Reckless Employer Misconduct*, 58 NOTRE DAME L. REV.

This does not suggest that the business community as a whole lacks concern for the safety of employees. Rather, it suggests that, currently, a significant portion of the burden of compensating the employee is often not borne by the responsible party, i.e., the employer. The inability of the insurer to recover from the employer by way of contribution or indemnity further illustrates the system's inefficiency.[23] Generally, the employer's sole liability, irrespective of the employer's conduct or the gravity of injury to the employee, is an increased insurance premium.[24] While insurance premiums in some industries have skyrocketed, previously cited cases indicate that rising insurance rates alone have not decreased reckless employer conduct.[25]

With exclusivity provisions in workers' compensation law, the system neither provides sufficient compensation for injured employees[26] nor encourages employers to operate safer workplaces. As long as the employer continues to bear an insignificant portion of workplace injury costs, the workers' compensation system will continue to operate inefficiently.

The counterargument posited by supporters of the current system maintains that, despite the inefficiency of the system in terms of allocating costs, workers' compensation was never intended to fully compensate injured workers.[27] If this be the case, then the employee should be allowed to seek an alternative remedy to the extent the system fails to compensate his injury. In cases of reckless employer conduct, as well as dual capacity, it is imperative to the well being of the injured worker that he be allowed to seek full compensation for his injuries by means of a common law action.

III. Dual Capacity Doctrine

The dual capacity doctrine, one exception to the exclusivity

890, 895 n.30 (1983).

23. See, e.g., Cordier v. Stetson-Ross, Inc., 184 Mont. 502, 508, 604 P.2d 86, 89 (1979), where the court said, "[i]t is our opinion that the broad provisions of § 39-71-411 MCA require us to hold that the provisions of the Workers' Compensation Act are exclusive as to the liability of the employer for damages sustained by the injured employee whether they are sought by the employee directly, or by a third party under contribution."

24. *See, e.g., Vesel*, 110 Mont. 82, 100 P.2d 75; *Mandolidis*, 161 W. Va. 695, 246 S.E.2d 907.

25. *See, e.g.*, cases cited *supra* note 16.

26. Samers and Kelly, *supra* note 19, at 75-76.

27. Note, *supra* note 17, at 1648. *See also* Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 Ga. L. Rev. 775, 800 (1982) (the author suggests that employees who receive benefits are worse off financially than prior to the injury).

rule, holds that "an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers upon him obligations independent of those imposed on him as employer."[28] One of the first cases supporting the dual capacity doctrine, *Duprey v. Shane*,[29] involved a woman who injured her back and neck while on the job at a chiropractic clinic. Following her injury, Duprey sought treatment from her employer, Dr. Shane, a chiropractor. The treatment administered by her employer only aggravated her initial injuries. Mrs. Duprey instituted a tort action against Dr. Shane, alleging that she was further disabled by her employer's negligent administration of chiropractic treatment. Dr. Shane argued that, since the injury arose in the course and scope of employment, Duprey's exclusive remedy was through the workers' compensation system.

The California Supreme Court disagreed with the defendant's assertion that the injuries arose in the course and scope of employment. Instead, the court held that "when the employing doctor elected to treat the industrial injury, the doctor assumed the same responsibilities that any doctor would have assumed had he been called in on the case."[30]

The court predicated its holding on the dual capacity doctrine—that a doctor in such a case is a "*person other than the employer.*"[31] More precisely, Dr. Shane acted outside the scope of the employer-employee relationship and was instead acting as the plaintiff's doctor. Where the employer bears two legal relationships to the employee, the dual capacity doctrine controls, and the injured employee will be allowed to recover a workers' compensation claim, as well as pursue a common law action, notwithstanding the exclusivity rule.[32]

The dual capacity doctrine is often pleaded in cases involving negligent medical treatment,[33] as well as in products liability

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28. 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 72.80, at 14-112 (1976). *See generally* Comment, *The Dual Capacity Doctrine: Piercing the Exclusive Remedy of Workers' Compensation*, 43 U. PITT. L. REV. 1013 (1982).

29. 39 Cal. 2d 781, 249 P.2d 8 (1952).

30. *Id.* at ____, 249 P.2d at 13.

31. *Id.* (emphasis added).

32. *See, e.g., Vesel*, 110 Mont. 82, 100 P.2d 75. *See also* REV. CODES MONT. § 2839 (1935), which provided in part: "In the event said employee shall prosecute an action for damages for or on account of such injuries so received, he shall not be deprived of his right to receive compensation but such compensation shall be received by him in addition to and independent of his right to bring action for such damages . . . ."

33. *See generally* Annot., 28 A.L.R.3d 1066 (1969) (addressing the employee's right to maintain a malpractice action for negligent medical care notwithstanding workers' compen-

cases.[34] Though the dual capacity doctrine effectuates a substantial advantage for the employee in terms of receiving full compensation for sustained injuries, it is supported in only a few jurisdictions.[35] Courts most often reject the doctrine because they find it contrary to the social philosophy behind workers' compensation.[36]

The Montana Supreme Court adopted the dual capacity doctrine in *Vesel v. Jardine Mining Co.*[37] Vesel, employed in defendant's mine, was struck in the eye by a steel fragment which separated from plaintiff's drill. He sought the aid of the company foreman who, on behalf of the defendant, "voluntarily and gratuitously assumed to render medical aid and attention to [Vesel]."[38] The foreman took Vesel to Mrs. Davison for treatment. Mrs. Davison had no medical qualifications and because of her negligence, Vesel lost the sight in his injured eye.

The court outlined the kinds of acts which will remove the employer from the protection of the exclusive remedy statute. Indeed, "[i]t was never intended or contemplated that an employer could hide behind the Compensation Act and thereby escape liability from his negligent or malicious acts towards an employee *for an act having no connection with the course of employment.*"[39]

Since *Vesel*, the Montana Supreme Court has not addressed the dual capacity doctrine. It is somewhat ironic, however, that the Montana Supreme Court recognizes the minority rule and allows tort actions under the dual capacity doctrine, but refuses to allow

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sation coverage). *See also* Wright v. District Court, ___ Colo. ___, 661 P.2d 1167 (1983); *Vesel*, 110 Mont. 82, 100 P.2d 75; Wimer v. Miller, 235 Or. 25, 383 P.2d 1005 (1963).

34. *See generally* Annot., 9 A.L.R.4th 873 (1981). *See also Bell*, 30 Cal. 3d 268, 637 P.2d 266, 179 Cal. Rptr. 30; Moreno v. Leslie's Pool Mart, 110 Cal. App. 3d 179, 167 Cal. Rptr. 147 (1980); Douglas v. E. & J. Gallo Winery, 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (1977); *Panagos*, 35 Mich. App. 554, 192 N.W.2d 542; *Tatrai*, 439 A.2d 1162. Cases rejecting the doctrine include Dixon v. Ford Motor Co., 53 Cal. App. 3d 499, 125 Cal. Rptr. 872 (1975); McCormick v. Caterpillar Tractor, 85 Ill. 2d 352, 423 N.E.2d 876 (1981); Needham v. Fred's Frozen Foods, Inc., 171 Ind. App. 671, 359 N.E.2d 544 (1977); Peoples v. Chrysler Corp., 98 Mich. App. 277, 296 N.W.2d 237 (1980); Billy v. Consolidated Mach. Tool Corp., 51 N.Y.2d 152, 412 N.E.2d 934, 432 N.Y.S.2d 879 (1980). It is crucial to note that California has by statute limited application of the dual capacity doctrine. *See* CAL. LAB. CODE § 3602 (West Supp. 1985).

35. *See, e.g.*, Smith v. Metropolitan Sanitary Dist., 77 Ill. 2d 313, 396 N.E.2d 524 (1979); Panagos v. North Detroit Gen. Hosp., 35 Mich. App. 554, 192 N.W.2d 542 (1971); *Vesel*, 110 Mont. 82, 100 P.2d 75; Volk v. City of New York, 284 N.Y. 279, 30 N.E.2d 596 (1940); Guy v. Arthur H. Thomas Co., 55 Ohio St. 2d 183, 378 N.E.2d 488 (1978).

36. *See generally* Annot., 23 A.L.R.4th 1151, 1155 (1983) (examining the dual capacity doctrine as a basis for tort recovery).

37. 110 Mont. 82, 100 P.2d 75 (1940).

38. *Id.* at 84, 100 P.2d at 76. While the facts of the case do not establish that the woman who treated plaintiff was an employee of defendant, the court obviously deemed the relationship close enough to attribute the woman's negligent medical care to the employer.

39. *Id.* at 99, 100 P.2d at 83 (emphasis added).

common law actions for injuries sustained as a result of willful, wanton, or reckless employer conduct.[40]

Courts which accept the dual capacity doctrine in products liability cases are quick to point out that the employer has a second capacity as a manufacturer out of which legal obligations arise. For instance, in *Bell v. Industrial Vangas*,[41] the court analyzed whether the product which injured the employee was sold to the general public rather than used solely for the employer's business.[42] The reasoning applied by the court is clear: The employer, who also occupies the role of manufacturer, has a duty to his employees who use the product in their work, as much as to the public which buys the product for its own use, to insure that manufactured products are safe for use. Injuries sustained by the employee due to a defective product will not insulate the employer from a products liability action.[43] Because only a few states recognize the dual capacity doctrine,[44] allowing employees to pursue common law actions in products liability cases will do much to force the employer to operate a safer workplace. Furthermore, the employer will bear a greater portion of the cost of employee injuries caused by defective products,[45] thereby facilitating more equitable compensation for the employee.

If workers' compensation truly forces industry to absorb the cost of employment-related injuries,[46] then those responsible for compensating injured workers surely must desire to maintain a safe workplace to minimize payments to injured workers. But, in most states the employer who assumes a dual capacity bears an insignificant portion of the cost of the injury and may render negligent medical care or manufacture defective products without fear of financial retribution. This makes little social or economic sense because employees continue to be subjected to such conduct, and the insurance industry, together with the general public, continues to bear the cost of employers' actions.

Opponents of the dual capacity doctrine argue fervently that

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40. *Compare Vesel*, 110 Mont. 82, 100 P.2d 75 *with Noonan* , ___ Mont. ___, 700 P.2d 623.

41. 30 Cal. 3d 268, 637 P.2d 266, 179 Cal. Rptr. 30.

42. *Id.* at 278, 637 P.2d at 272, 179 Cal. Rptr. at 36.

43. *Id.*

44. *See generally* cases cited, *supra* note 32.

45. Ashford and Johnson, *supra* note 21, at 759-60.

46. *See McCormick*, 85 Ill. 2d 352, 356, 423 N.E.2d 876, 877, where the court said "the design underlying the Act was that the cost of industrial injuries should be borne by industry and not by the injured employee or by the general public." However, the court refused to apply the dual capacity doctrine and the employee was thereby precluded from pursuing a tort action.

workers' compensation should, under all circumstances, provide speedy and almost-guaranteed compensation in return for employer tort immunity. For example, one court has stated that,

> in the field of workers' compensation law, and in suits by a worker against his employer, the initial injury is the cause of all that follows, even where there is superimposed upon the original injury, a new, or additional or independent injury during the course of the [medical] treatment, negligent or otherwise.[47]

This reasoning, taken to the extreme, implies that the employer who, in treating the employee's injury amputates the leg in an effort to stop the toe from bleeding, is nevertheless absolved of any tort liability. Acceptance of this reasoning does nothing to foster the operation of a safe workplace. On the contrary, by refusing to allow tort claims under the auspices of the dual capacity doctrine, the majority of states are encouraging activity which breeds unsafe workplaces.[48]

Moreover, opponents of the dual capacity doctrine argue that allowance of independent tort actions would disrupt the balance between workers and employers. As Justice Richardson stated in his dissent in *Bell v. Industrial Vangas*,[49]

> this delicate balance, carefully conceived and preserved . . . is significantly altered and disturbed when we hold that each of the thousands of employers in this state engaged in manufacturing for ultimate sale to the public loses the statutory immunity to any employee who is injured by defects in the goods or products manufactured.[50]

The California Legislature obviously agreed with Justice Richardson since, in 1982, it restricted application of the dual capacity doctrine.[51]

Because courts and legislatures have failed to carve out limited exceptions to the exclusivity rule, employers continue to operate unsafe workplaces. Unless they face adverse financial effects, many employers will remain unwilling to create safe working environments.[52] Expansion of exceptions to the exclusive remedy rule will likely result in an increase of employee tort actions, but this alone does not warrant continuance of the status quo. The "floodgate of litigation" argument which various courts have alluded to

47. McAlister v. Methodist Hospital, 550 S.W.2d 240, 245 (Tenn. 1977).
48. *See, e.g., McCormick*, 85 Ill. 2d 352, 423 N.E.2d 876.
49. 30 Cal. 3d 268, 637 P.2d 266, 179 Cal. Rptr. 30.
50. *Id.* at 288-89, 637 P.2d at 279, 179 Cal. Rptr. at 43.
51. CAL. LAB. CODE § 3602 (West Supp. 1985).
52. *See* Schroeder, *supra* note 22, and accompanying text.

simply does not address the inequities of the present system.[53] Without the dual capacity doctrine,

> the prevailing authority allows employers to get away with the most "callous disregard" of their employees' safety and health. It also forces employees to look for someone else to sue, usually a manufacturer, even when it is the employer who is most responsible (or totally responsible) for his or her injuries. Employers simply do not have the same economic incentives to protect the physical safety of their employees that, for example, manufacturers have to protect consumers who use their products.[54]

McCormick v. Caterpillar Tractor,[55] illustrates this lack of economic incentive. In *McCormick*, an employee injured on the job was treated by a doctor employed by the defendant at its in-house clinic.[56] The Illinois Supreme Court dismissed the employee's suit against his employer for providing negligent medical care, and rejected application of the dual capacity doctrine.[57] This decision forced McCormick to accept a workers' compensation award for his injuries, and the employer was absolved of liability since, as the court noted, the employer was merely complying with the law.[58]

The effect of *McCormick* and similar decisions is that employers who provide in-house medical treatment, be it correctly or negligently administered, will be immune from common law actions. More importantly, employers will have virtually no incentive to provide adequate medical care in employer-operated medical facilities.[59]

In essence, refusal to adopt the dual capacity doctrine as an exception to the exclusivity rule exacerbates one of the primary problems inherent in the workers' compensation system: inadequate compensation for the injured worker.[60] By refusing to allow employees to sue their employers in tort,

> the present system permits employers to impose obviously dangerous working conditions on employees—at workers' compensa-

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53. 30 Cal. 3d at 288, 637 P.2d at 278, 179 Cal. Rptr. at 42, where the dissent argued that expansion of the dual capacity doctrine would ultimately include the employer as landowner or cafeteria proprietor. *See also Noonan*, ___ Mont. ___, 700 P.2d 623, 626 (Morrison, J., concurring).

54. Amchan, *supra* note 8, at 693.

55. 85 Ill. 2d 352, 423 N.E.2d 876 (1981).

56. *Id.* at 354-55, 423 N.E.2d at 877.

57. *Id.* at 360, 423 N.E.2d at 879.

58. *Id.* at 357-58, 423 N.E.2d at 878.

59. *See, e.g.*, Note, *The Illinois Workers' Compensation Act and the Dual Capacity Doctrine—McCormick v. Caterpillar Tractor Co.*, 31 DEPAUL L. REV. 607, 621 (1982).

60. Note, *supra* note 17, at 1643 n.16.

tion's relatively reduced level of recovery—because the employee frequently cannot prove an employer's specific intent to cause harm. This result offends the dual policy of the workers' compensation system—to encourage a safe workplace while providing adequate compensation for certain injuries.[61]

IV. Intentional Tort and Willful, Wanton and Reckless Conduct

While workers' compensation is an injured employee's sole remedy in nearly all cases, courts are unanimous in allowing the injured worker to sue the employer when such injury is the result of the employer's commission of an intentional tort.[62] Most often the employee sues the employer because of a physical beating the employee has suffered from either the employer[63] or one of his co-employees.[64] The crux of the issue in cases of physical battery is whether the employer commits the tort or whether the tort is a supervisory employee's act.[65] The employee will likely be allowed recovery if he sustains a beating at the hands of the employer, but in cases involving co-employee batteries, courts will probably dismiss the case as to the employer.[66]

The question that arises in cases of alleged intentional misconduct is whether the conduct is "intentional." Courts frequently struggle with this issue, employing terms ranging from merely negligent, negligent, and grossly negligent, to culpable negligence, willful, wanton and reckless misconduct, and intentional misconduct.[67] The attorney's task of deciphering what these terms mean is a for-

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61. Schroeder, *supra* note 22, at 890.

62. See, e.g., *Noonan*, ___ Mont. ___, 700 P.2d 623 (1985), and *Great W. Sugar Co.*, 188 Mont. 1, 7, 610 P.2d 717, 720 (1980), where the court said: "[t]he 'intentional harm' which removes an employer from the protection of the exclusivity clause of the Workers' Compensation Act is such harm as it [sic] maliciously and specifically directed at an employee, or class of employee out of which such specific intentional harm the employee receives injuries as a proximate result."

63. *See generally* Annot., 96 A.L.R. 1064 (1979) (analysis of what employer conduct is intentional so as to permit maintenance of a tort action by the employee). *See also* Brown v. Stauffer Chem. Co., 167 Mont. 418, 539 P.2d 374 (1975); McGrew v. Consolidated Freightways, Inc., 141 Mont. 350 (1963); Readinger v. Gottschall, 201 Pa. Super. 134, 191 A.2d 694 (1963).

64. *See* Note, *Massey v. Selensky: Workers' Compensation and Coemployee Immunity in Montana*, 46 Mont. L. Rev. 217 (1985).

65. *See, e.g.*, Jablonski v. Multack, 63 Ill. App. 3d 908, 380 N.E.2d 924 (1978); *McGrew*, 141 Mont. 324, 377 P.2d 350.

66. *Jablonski*, 63 Ill. App. 3d 908, 380 N.E.2d 924; *McGrew*, 141 Mont. 324, 377 P.2d 350.

67. *See generally* cases cited, *supra* note 16. *See also* Ulicny v. National Dust Collector Corp., 391 F. Supp. 1265, 1268 (E.D. Pa. 1975).

midable one.

In the typical business atmosphere, the employer should not be held liable for the intentional torts of a foreman or supervisor.[68] The employer simply may not know of and cannot control the employee's tortious acts. But, the higher up the employment ladder the injuring employee sits, the more likely it is the employer will he beld liable for tortious acts of the supervisory employee.

A different situation arises, however, when the employer goes beyond simple negligence to the point of willful, wanton, and reckless conduct. Such conduct is not "intentional" in the true sense of the word.[69] However, reckless conduct is not comparable to negligence either. In fact, negligence implies accidental or inadvertent, whereas recklessness envisions knowledge on the actor's part that certain consequences are probable.

As one court observed near the turn of the century, willful and reckless conduct must be viewed as "much more than mere negligence, or even gross or culpable negligence, and as involving conduct of a quasi-criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequence."[70] Moreover, workers' compensation is designed to replace tort actions *only* with respect to negligently-caused accidents.[71]

"Entrepreneurs were not given the right to carry on their enterprises without any regard to the life and limb of the participants in the endeavor and free from all common law liability."[72] Allowing an employer to be immune from tort liability in the face of reckless conduct does not promote a safe workplace. Instead, this permits an employer to commit reckless acts free from reprisal, knowing the only financial retribution will be increased insurance premiums.

Reckless employer conduct does not in any manner comport with the purposes of workers' compensation, yet courts in nearly all jurisdictions have ruled against employees who sue their em-

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68. *See, e.g., Jablonski*, 63 Ill. App. 3d 908, 308 N.E.2d 924; *McGrew*, 141 Mont. 324, 377 P.2d 350. The courts alluded that where the person who inflicts the injuries is the alter ego of the employer, a common law action against the employer becomes more plausible.

69. BLACK'S LAW DICTIONARY 727 (5th ed. 1979) defines "intention" as the "determination to act in a certain way to do a certain thing. Meaning; will; purpose; design." In addition, the RESTATEMENT (SECOND) OF TORTS § 8A (1965) uses intent to illustrate the actor's desire to cause the consequences of his act, or that the actor believes the consequences are substantially certain to result from the act.

70. *In re Burns*, 218 Mass. 8, 10, 105 N.E. 601, 602 (1914).

71. *Mandolidis*, 161 W. Va. 695, 700, 246 S.E.2d 907, 911.

72. *Id.* at 705, 246 S.E.2d at 913.

ployer for injuries sustained by reckless employer conduct.[73] Courts instead have required employees to seek their remedy through workers' compensation.[74] While the employee attempting to prove reckless conduct would have a difficult burden of proof, he should not be prohibited from pursuing such an action merely because the defendant happens to be the employer.

The court in *Mandolidis v. Elkins Industries, Inc.*,[75] ruled exactly opposite the majority of courts, saying:

> Wilfulness or wantonness imports premeditation or knowledge and consciousness that injury is likely to result from the act done or the omission to act. Wilful, malicious, or intentional misconduct is not, properly speaking, within the meaning of the term "negligence." Negligence and wilfulness are mutually exclusive terms which imply radically different mental states. "Negligence" conveys the idea of inadvertence as distinguished from premeditation or formed intention. An act into which knowledge or danger and wilfulness enter is not negligence of any degree, but is wilful misconduct.[76]

In *Mandolidis*, three actions were consolidated on appeal. The first involved an employee who sustained injuries when his hand came in contact with a ten-inch table saw which was not equipped with a safety guard;[77] the second concerned a worker who died when a platform spanning an excavation at a bridge construction site collapsed;[78] and the third involved an employee crushed to death by falling slate in a coal mine.[79]

The *Mandolidis* court stated that, "[t]he conduct removing the immunity bar must be undertaken with a knowledge and an appreciation of the high degree of risk of physical harm to another created thereby."[80] Consequently, evidence of willful, wanton, and reckless conduct precludes a finding of accidental injury. If the in-

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73. *See generally* cases cited, *supra* note 16. *See also* Fryman v. Electric Stream Radiator Corp. 277 S.W.2d 25 (Ky. 1955); Suk Hwan Chung v. Fred Meyer, Inc., 276 Or. 809, 556 P.2d 683 (1976); Higley v. Weyerhaeuser Co., 13 Wash. App. 269, 534 P.2d 596 (1975).

74. *Compare Noonan*, ___ Mont. ___, 600 P.2d 623; *and Enberg*, 158 Mont. 135, 489 P.2d 1036 (the court stated that without an intentional tort, the employee's sole remedy is workers' compensation benefits); *with* Blankenship v. Cincinnati Milacron Chem., Inc., 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982); *and* Neal v. Carey Canadian Mines, Ltd., 548 F. Supp. 357 (E.D. Pa. 1982).

75. 161 W. Va. 695, 246 S.E.2d 907.

76. *Id.* at 705, 246 S.E.2d at 914.

77. *Id.* at 707, 246 S.E.2d at 914-15.

78. *Id.* at 710-12, 246 S.E.2d at 916-17.

79. *Id.* at 716-17, 246 S.E.2d at 919-20.

80. *Id.* at 706, 246 S.E.2d at 914. *See also* RESTATEMENT (SECOND) OF TORTS § 500, comment a (1965).

jury is not accidental, it is outside the scope of workers' compensation coverage and the employee will be allowed to initiate a tort action. A 1983 amendment to the West Virginia Code limited the holding of *Mandolidis*; the employee may now sue only when the employer acts with "deliberate intention."[81]

By setting an extremely high standard for maintenance of common law actions, the court in *Mandolidis* achieved two important goals. First, it insured that only employers whose conduct goes beyond negligence to the point of willful, wanton, and reckless conduct will be removed from the exclusivity provision and subjected to tort liability. This, hopefully, will act as an incentive for the reckless employer—the employer who acts knowing the probable result will be employee injury—to maintain a safe working environment.

Second, the *Mandolidis* decision maintained the integrity and fundamental fairness of the legal system. If we recognize that one of the purposes of workers' compensation is to provide a type of social insurance for those unfortunate enough to be injured on the job due to unforeseen accidents,[82] we should also be willing to recognize that equating reckless employer conduct with accidental injury is absurd. Negligence implies accidental or inadvertent, whereas willful, wanton, or reckless conduct envisions knowledge by the employer of danger to employees. The employee whose injuries are the result of reckless employer conduct should not be precluded from seeking full compensation merely because the defendant is also the employer.[83]

Some states have addressed the problem of the reckless employer escaping tort liability by enacting legislation which grants the employee a penalty award when the employer's conduct cannot be characterized as ordinary negligence.[84] The Montana Legislature has not enacted a penalty provision which would provide an additional award to the injured employee if the injury results from willful employer misconduct or from the employer's removal of a safety device required by law. In any case, while the concept is good, the average penalty award[85] often is not enough incentive for

81. W. VA. CODE § 23-4-2 (1985).

82. *See, e.g.*, Mahlum v. Broeder, 147 Mont. 386, 394, 412 P.2d 572, 576 (1966).

83. *Bell*, 30 Cal. 3d at 279, 637 P.2d at 273, 179 Cal. Rptr. at 37.

84. Schroeder, *supra* note 21, at 90. *See also* ARK. STAT. ANN. § 81-1310 (1981); CAL. LAB. CODE § 4553 (West Supp. 1985); KY. REV. STAT. ANN. § 342.165 (Baldwin 1981); MO. ANN. STAT. § 287.120 (Vernon 1985); N.M. STAT. ANN. § 52-1-10 (1978); N.C. GEN. STAT. § 97-12 (1979); UTAH CODE ANN. § 35-1-12 (1974); WIS. STAT. ANN. § 102.57 (West Supp. 1985).

85. *See generally* statutes cited, *supra* note 93. The penalty awards average 10% of the award to the injured employee.

the reckless employer to maintain a safe work environment.

V. Willful, Wanton, or Reckless Employer Conduct in Montana

The *Mandolidis* decision presents a persuasive argument for allowing an injured employee to initiate a tort action where the employer exhibits reckless conduct. However, the Montana Supreme Court has not been receptive to such an interpretation of workers' compensation law. In fact, in Montana, with the exception of intentional torts and injuries occurring under the dual capacity doctrine, "an employer is not subject to any liability whatever for the death of or personal injury to an employee covered by the Workers' Compensation Act . . . ."[86]

The Montana Supreme Court has addressed the issue of whether to impose tort liability upon the willful, wanton, or reckless employer and has refused to allow the injured employee to maintain a tort action.[87] In *Enberg v. Anaconda Co.*,[88] the plaintiff instituted a tort action to recover for the death of her husband. The decedent died in a mine explosion which occurred after several fires in defendant's mines.[89] Even though the plaintiff alleged the employer had (1) violated state safety statutes regarding the storage of explosives in mines, (2) breached its own safety regulation, and (3) continued blasting operations despite serious and ongoing mine fires, the Montana Supreme Court affirmed the lower court's dismissal of the suit, holding that plaintiff's sole remedy was by way of workers' compensation.[90]

Quoting Larson, the court said:

> [W]hat is being tested here is not the degree of gravity or depravity of the employer's conduct but rather the narrow issue of intentional versus accidental quality of the precise event producing injury. The intentional removal of a safety device or toleration of a dangerous condition may or may not set the stage for an accidental injury later. But in any normal use of the words, it cannot be said, if such an injury does happen, that this was deliberate infliction of harm comparable to an intentional left jab to the chin.[91]

The court's reliance on Larson's analogy to the left jab totally ne-

86. Mont. Code Ann. § 39-71-411 (1985).
87. *See* cases cited, *supra* note 16.
88. 158 Mont. 135, 489 P.2d 1036.
89. *Id.* at 136, 489 P.2d at 1036.
90. *Id.* at 138, 489 P.2d at 1037.
91. *Id.* at 137, 489 P.2d at 1037. *See also* Larson, *supra* note 27, at § 68.13.

glected the issue of whether the Workers' Compensation Act[92] should cover injuries occasioned by the employer's willful, wanton, or reckless conduct. The court's failure to recognize the distinction between negligence and reckless conduct[93] only harms those whom the Workers' Compensation Act is intended to protect, namely, the employees. The court's decision in *Enberg* that the decedent's death was "accidental"[94] is plainly incorrect. Accident, in the context of workers' compensation, is defined as "an event that takes place without one's foresight or expectation; an undesigned, sudden and unexpected event."[95]

The Workers' Compensation Act is to be liberally construed[96] "in order that the humane purposes of the legislation shall not be defeated by narrow and technical construction, and *the intention of such requirement is for the benefit and protection of the injured workman and his beneficiaries.*"[97] However, "liberal construction is no justification for disregarding plain statutory provisions."[98] The Montana Supreme Court must strike some type of balance between liberal construction and plain statutory meaning. On this basis, it becomes evident that the Montana Workers' Compensation Act does not envision coverage of injuries caused by reckless employer conduct.

Montana law specifically provides that, to be covered by the provisions of the Workers' Compensation Act, the injury sustained must be "a tangible happening of a traumatic nature from an *unexpected* cause or *unusual* strain."[99] Liberal construction is one thing, but to equate "unexpected" and "unusual" with reckless conduct completely disregards the plain statutory provision of the Act. Moreover, one must remember that the liberal construction is

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92. MONT. CODE ANN. §§ 39-71-101 to -2909 (1985).

93. See, e.g., *In re Burns*, 218 Mass. 8, 10, 105 N.E. 601, 602 (1914), where the court said, in contradistinction to mere negligence, reckless conduct is of a "quasi-criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequence." But see BLACK'S LAW DICTIONARY 931 (5th ed. 1979), where it is said that negligence "refers only to that legal delinquency which results whenever a man fails to exhibit the care which he ought to exhibit, whether it be slight, ordinary, or great, It is characterized chiefly by inadvertence, thoughtlessness, inattention, and the like, while 'wantonness' or 'recklessness' is characterized by willfulness."

94. 158 Mont. at 137, 489 P.2d at 1037.

95. BLACK'S LAW DICTIONARY 15 (5th ed. 1979).

96. MONT. CODE ANN. § 39-71-104 (1985).

97. McCoy v. Mike Horse Mining & Milling Co., 126 Mont. 435, 440, 252 P.2d 1036, 1039 (1953) (emphasis added).

98. State *ex rel.* Magelo v. Industrical Acc. Bd., 102 Mont. 455, 462, 59 P.2d 785, 789 (1936).

99. MONT. CODE ANN. § 39-71-119 (1985) (emphasis added).

to be in the employee's favor. In spite of any expansive meaning the Montana Supreme Court may give to the words "unexpected" and "unusual," "there must be a limit on what the employee must tolerate."[100]

While the majority of states do not allow employee tort actions against the employer,[101] these same states and a number of commentators agree that a compensable injury under workers' compensation law is one which results from an "accident," "unexpected cause," or "fortuitous event."[102] In Montana, for example, the Legislature in 1915 stated that a compensable injury encompassed "only an injury resulting from some *fortuitous event*."[103] Clearly, a fortuitous event or unexpected cause comports with the meaning of accident; reckless conduct does not. By definition it is evident that at its inception in Montana and, undoubtedly, in other states as well, workers' compensation was designed to provide coverage for industrial accidents and not willful, wanton, or reckless conduct.

The situation, unfortunately, has not changed in Montana. The supreme court in *Great Western Sugar Co. v. District Court*,[104] another case involving alleged reckless employer conduct, denied the injured worker the opportunity to seek a tort remedy against the employer.

While allowance of tort actions against the reckless employer is admittedly a minority rule, a few jurisdictions have changed this dismal situation.[105] The law has slowly evolved in this arena. As a result, many workers faced with futures destroyed by industrial injuries are forced to bear a large portion of the cost of their injuries, albeit with the assistance of workers' compensation benefits, despite the fact that they are unable to recover damages from the

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100. *Noonan*, ___ Mont. ___, 700 P.2d at 628 (Hunt, J., dissenting).

101. *See* statutes cited, *supra* note 11.

102. *See, e.g.*, MONT. CODE ANN. § 39-71-119 (1985); NEB. REV. STAT. § 48-151(2) (1984); N.J. STAT. ANN. § 34:15-1 (West 1959); N.M. STAT. ANN. § 52-1-19 (1978); N.Y. WORK. COMP. LAW § 2(7) (McKinney 1965); N.D. CENT. CODE § 65-01-02(7) (1960); OKLA. STAT. ANN. tit. 85, § 3(7) (Supp. 1984); OR. REV. STAT. § 656.005(8)(a) (1983); S.C. CODE ANN. § 42-1-160 (1985); TENN. CODE ANN. § 50-6-102(4) (Supp. 1985); UTAH CODE ANN. § 35-1-44(5) (1974); VT. STAT. ANN. tit. 21, § 601(11)(A) (1978); VA. CODE § 65.1-7 (1980); WIS. STAT. ANN. § 102.01(2)(c) (West Supp. 1985). *See also* N. GROSFIELD, MONTANA WORKERS' COMPENSATION MANUAL § 3.10 (1979).

103. 1915 Mont. Laws ch. 96, § 6.

104. 188 Mont. 1, 610 P.2d 717. There the plaintiff sustained permanent damages when his foot was struck by a truck's winggate. The plaintiff alleged the employer had knowledge of previous injuries caused by the same piece of equipment and that the employer knew of the dangers of the equipment.

105. *See. e.g., Neal*, 548 F. Supp. 357; *Blankenship*, 69 Ohio St. 2d 608, 433 N.E.2d 572; *Mandolidis*, 161 W. Va. 695, 246 S.E.2d 907.

reckless employer.

Most recently, in *Noonan v. Spring Creek Forest Products, Inc.*,[106] the Montana Supreme Court maintained its position. The plaintiff, employed by a small lumber concern as a wood planer operator, fed rough lumber through the planer to insure proper size.[107] While operating the planer one morning, the plaintiff placed his hand into the machine to dislodge a piece of lumber.[108] Noonan received serious injuries which caused permanent damage to his arm.[109]

The plaintiff alleged numerous facts to support his claim based upon reckless employer conduct,[110] and yet the court refused to adopt the minority rule, saying, "[w]here an employee's allegations go no further than to charge an employer with knowledge of a hazardous machine, the complaint does not state a cause outside the purview of our exclusive remedy statute."[111] Just as it had done previously in *Enberg*[112] and *Great Western Sugar Co.*,[113] the court refused to address the crucial issue of whether the Montana Workers' Compensation Act envisions coverage of employee injuries which are not the result of simple negligence, but rather willful, wanton, or reckless conduct—conduct which borders on intentional tort.[114]

Workers' compensation is not intended to cover injuries other than those caused by industrial accidents.[115] Consequently, refusal by courts to allow injured workers to maintain common law actions against their employers for the employer's willful, wanton, or reckless conduct flies in the face of the overall spirit of the Workers' Compensation Act. Injuries caused by recklessness are simply not comparable to injuries which are the result of accidents. Such a comparison is in fact one of apples and oranges.

VI. Conclusion

Workers' compensation today plays an important role in soci-

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106. ___ Mont. ___, 700 P.2d 623.
107. *Id.* at ___, 700 P.2d at 624.
108. *Id.*
109. *Id.* at ___, 700 P.2d at 627 (Sheehy, J., dissenting).
110. *Id.* at ___, 700 P.2d at 624. *See also* Restatement (Second) of Torts § 500, comment a and special note (1965).
111. *Id.* at ___, 700 P.2d at 625-26.
112. 158 Mont. 135, 489 P.2d 1036.
113. 188 Mont. 1, 610 P.2d 717.
114. *See* Restatement (Second) of Torts § 500 (1965).
115. *See, e.g., Mandolidis*, 161 W. Va. 695, 700, 246 S.E.2d 907, 911. *See also* statutes cited, *supra* note 111.

ety. Yet, most actors in the system are dissatisfied with workers' compensation as a whole. Employees argue that they receive inadequate compensation for their injuries, and insurance carriers feel as though their only role is to sign the check every time an employee is injured. Rather than require courts to stretch the law to find a compensable injury,[116] it may be more appropriate to change the system. Indeed, the line drawing that courts have done in finding compensability of work-related injuries has only exacerbated the problem of inefficient compensation.

One possible solution may be to require employee contribution to the cost of maintaining workers' compensation insurance. In exchange for employee contribution, employers would no longer be immune from suit in instances of reckless employer conduct. Employee contribution would clearly reduce the employer's out-of-pocket insurance expenses. Moreover, allowance of common law actions would encourage employers to maintain a safer work environment; and it would also take some of the financial burden off the insurance industry. Such a plan would undoubtedly be confronted with problems, but the present system must be realigned if workers' compensation is to remain a viable mechanism for solution of work-related injury claims.

Workers' compensation was initiated to compensate *negligently* caused injuries. The original systems did not envision allowing employers to exhibit reckless conduct with impunity. To do so would be a complete mockery of our legal system. Yet, most jurisdictions are unwilling to alter the traditional system, which allows reckless employers to escape serious liability. And while the reckless employer who exhibits recklessness or willful misconduct is shielded from tort liability, the employee is often precluded from receiving workers' compensation benefits when he has committed willful misconduct.[117] Legislatures and courts should immediately address the inequity that the exclusivity rule presents. Failure to do so may result in the slow dissolution of the workers' compensation system.

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116. *See, e.g., Conway*, ___ Mont. ___, 669 P.2d 225 (1983).

117. *See, e.g.*, CAL. LAB. CODE § 3600(d)-(g) (1971); CONN. GEN. STAT. ANN. § 31-284(a) (1972); IDAHO CODE § 72-208 (1973); IOWA CODE ANN. § 85.16 (1984); NEB. REV. STAT. § 48-101 (1984); N.H. REV. STAT. ANN. § 281.15 (1978).